IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 43.

ELOISA L. BERGERE, FOR HERSELF AND THE OTHER HEIRS OF MANUEL ANTONIO OTERO AND MIGUEL ANTONIO OTERO, *Appellant*,

VS.

THE UNITED STATES ET AL.

No. 46.

THE UNITED STATES, *Appellant*,

VS.

ELOISA L. BERGERE, FOR HERSELF AND THE OTHER HEIRS OF MANUEL ANTONIO OTERO AND MIGUEL ANTONIO OTERO.

PETITION FOR REHEARING.

Comes said Eloisa L. Bergere, for herself and the other heirs of Manuel Antonio Otero and Miguel Antonio Otero, appellant in case No. 43, and appellee in

case No. 46, by T. B. Catron, her attorney, and petitions this honorable court to withdraw the mandate and vacate the judgment heretofore entered herein, dismissing the petition in said cause, and to grant a rehearing in said cause; and as ground for said motion respectfully assigns the following errors of law and fact appearing in said judgment as explained by the opinion of the Court:

(1) In the conclusion (*168 U. S. 73*) that the quotation from petitioner's brief that this "grant was not finally made until return was made by the *alcalde* and approval had" was correct as to the law, and in the statement in the opinion that the Governor in his reference of the case to the *alcalde* bids him transmit the *expediente* to his office so that if approved the "proper *testimonio*" may be ordered to be given the petitioner and that until approved the action of the *alcalde* was of *no effect* and that there was, therefore, no grant.

(2) In the conclusion (*Opinion, 168 U. S. 73*) that the papers themselves show no approval by the Governor and that there is no evidence of other facts or circumstances from which such approval could properly be presumed.

(3) In the conclusion (*Opinion, 168 U. S. 74*) that the *alcalde* on his own account proceeded to deliver a much larger tract of land than Baca had petitioned for.

(4) In the conclusion that the "proper *testimonio*" to be given was "something other than the *expediente*." (*Opinion, 168 U. S. 76.*)

(5) In the conclusion (*Opinion, 168 U. S. 76*) that the order of the Governor to the *alcalde* to give the possession of the land and designate the limits, was an authority to designate only the limits described in the petition

(6) In the conclusion that there were not sufficient acts of possession to aid the presumption of approval by the Governor or to invoke thereby the presumption arising from length of time. (*Opinion, 168 U. S. 77, 78 and 79.*)

(7) In the conclusion that there was no evidence of such exclusive possession by Baca founded on a claim of right to the land.

(8) In overlooking the fact that the grant was a grant for pasturage and not for cultivation and residence, and that the possession required to occupy and hold it in exclusive right was such possession as might be had by pasturing and grazing live stock, thereon, the land being shown to be useful as grazing land only and granted for that purpose, with the incident thereto that if possible it might be partly cultivated.

(9) In the conclusion that the failure of Baca to include the grant in the inventory of his property in his will is a circumstance showing want of approval, or that Baca did not think he owned the property. (*Opinion, 168 U. S. 80, 81 et seq.*)

(10) In the conclusion (*168 U. S. 85*) that "no grant perfect or imperfect was in existence at this time * * * and that there is not sufficient evidence that at the time of the cession of New Mexico to the United States the predecessors or grantors of petitioner had any title of any kind whatever, perfect or imperfect, and that there should be no confirmation of any alleged imperfect title or grant."

(11) In the conclusion that the burden was on claimant to show positive approval,—this after fifty years delay in giving her an opportunity to do so and all the witnesses had died who could have known that Bartolome Baca got the *expediente*.

(12) In the conclusion that the acknowledgment of Baca's ownership was not shown to be by others than Baca's heirs and employes.

(13) In the conclusion (*Opinion, 168 U. S., p. 75*) that from the mere fact of the possession of the papers there is no sufficient ground on which to base a presumption of delivery; while all the facts taken together, acknowledged by everyone, the possession given, and held for over twenty years, with 75,000 sheep and large numbers of horses, beef cattle and hogs, and the possession of the estate by Baca's sons and employes, create strong corroboration and presumption.

(14) In the conclusion (*168 U. S. 75*) that some evidence other than possession should have been given, it appearing that seventy years had elapsed since the papers were given, that all the witnesses to the delivery are dead, that this government waited fifty years to pass this law and give claimant an opportunity to put in evidence.

(15) In the conclusion (*Opinion, 168 U. S. 78*) that it is not stated in the evidence who were the persons who recognized Baca's ownership, whether servants or agents of Baca or others.

(16) In the conclusion (*168 U. S. 78*) that the Mexican government during the time when Baca was in possession regarded the tract as vacant and unoccupied, so far as to permit of its conveyance to other parties.

(17) In not holding at least that the grant was an imperfect one which the claimants would have had the right to make perfect under the Mexican government, and consequently are entitled to confirmation as such for eleven leagues as held by the lower court.

ARGUMENT.

It is submitted with deference that material error has been committed in this cause by reason of the conclusion of the court that there was no grant until the approval of the *alcalde's* acts by the Governor. Petitioner did not intend in the brief to admit that a failure of the Governor to approve the acts of the *alcalde* left Bartolome Baca without any right or grant to the land, but that in the absence of such approval the grant, though not final, was simply inchoate, and the right of the grantee to the whole of the land given in possession by the *alcalde* was not definitely fixed. The act of approval was necessary perfectly to complete the title of Baca to the land, to the full extent of the boundaries designated by the *alcalde*, the boundaries mentioned by him being natural objects different in part from those specifically stated in the petition for the grant as points to which the land asked for extended. So that the petitioner did not in her brief admit nor does she admit that there was no grant without such approval.

The petition asks for the tract "called *Torreon*" and then states that it extends to certain points mentioned, but does not say it was bounded by those points or stopped at them. It was a particular tract, "*Torreon*," which was described as extending at least as far as those objects mentioned, and the petitioner prayed the Governor "to grant the same, in real possession * * * in order to *establish thereon* a *permanent ranch* or hacienda which he engages to *occupy with his stock*," etc.

The Governor in the first paragraph of his decree granted it "as he asked according to law understanding no injury would result to any one, but there would be an *increase of stock raising.*

The court will see by this decree that the Governor granted what was asked, and his grant was absolute and there were no conditions to it. The only condition which can be inferred was as to whether the *alcalde* in his act of possession might conform to the grant: if so, the *expediente* was to be returned by him to be approved and a formal *testimonio* given thereon, or if not then the same was to be left for future action or correction.

There was no law, decree or custom making a *formal delivery* of a Spanish grant *essential* to the grant, nor was there any such law or custom making a delivery of a *testimonio* or *expediente* or other evidence of title necessary, before the title should vest. A grant when made operated *eo instanti*, like a legislative grant of the United States Congress, provided the property could be identified. Could this be identified? It was a particular tract called "*Torreon;*" that identified it. Also it gave certain natural objects to which the tract extended, at least, and as far as it lay within those boundaries it was also identified. The only object of juridicial possession was to identify the boundaries, if perchance they passed beyond or only stopped at the natural objects given. The tract "*Torreon*" was granted,—did it stop at or pass beyond the natural objects? If the natural objects mentioned were the actual boundaries of the tract and it did not pass beyond them, there could be no object in giving juridical possession. By the description given, the land would be known and segregated from the public domain, so that the

grant was perfect of the tract at least up to the natural objects specified and if it passed them or the *alcalde* should decree other boundaries or "*limits*" necessary to be "*designated*" he would ascertain and fix them and report for confirmation, so that a proper *testimonio*, meaning a document of title showing the changed limits might be signed. This is all that could be concluded from the granting decree itself.

There is error in the conclusion that the grant papers themselves show no approval by the Governor and that there is no evidence of other facts or circumstances from which such approval could properly be presumed. The grant papers and other facts and circumstances must be taken and considered all together and not separately as seems to have been done. The grant papers are admitted to be genuine. They show the petition, the grant, the act of possession, and the return thereof to the Governor is shown by the indorsement of Gov. Melgares at the bottom of the act of possession. They were in possession of Baca, were found with his papers in possession of his heirs by the executor of one of his heirs, and in a box which had belonged to Baca himself. Baca had taken possession of the land in 1819, and occupied it until his death in 1834, fifteen years, and his widow and children continued to occupy it for many years after him, claiming it as their own, from 1819. It was recognized by every one as his and theirs.

See evidence of Clemente Chaves, pp. 79, 80, 81.

This evidence was apparently overlooked by the Hon. Justice who prepared the opinion. The *alcalde* certainly returned the grant papers to the Governor and he considered them and they are afterwards found with Baca. Why? Who should explain this

after seventy years? Who can? Is not the burden on the party at fault? The treaty required all property of Mexicans to be protected. It was the duty of this Government to take proper steps to do so, promptly, as it did in California. This it neglected to do in New Mexico for forty-five years, until all the persons having knowledge of these facts had passed away. This grant is now seventy years old, and the time from its date to the establishment of the land court was sixty-two years. Witnesses who might have been present when Bartolome Baca received the grant papers from the Governor with his indorsement would then have to be about eighty-five years of age. It is not supposed that many people would have been present or would have taken note of the fact. The Governor delivered the title papers, which were a "proper *testimonio*" or evidence of title, a document which testified to what had been done. Baca kept possession and was acknowledged and respected by every one as the owner, and used the grant for the purposes for which it was given, complied with the conditions so far as he was required, if there were any, and showed good faith in claiming ownership and retaining possession. Why should the grand-children and great-grand-children be now required to furnish proof of how Baca came by the title paper, further than possession presumes?

The court erred (*Opinion, 168 U. S. 74*) in finding that the *alcalde* on his own account proceeded to deliver a much larger tract of land than Baca petitioned for. What did Baca petition for? "A tract called '*Torreon*' and which extends on the north to the *Monte de Cibolo;* on the south to the *Ojo del Cuerro*, on the east to the *Estancia* Springs, and on the west to the *Ojo*

mountains." The tract "called *Torreon*" was asked for. If it did not extend to the natural objects mentioned, no more than the *tract* was asked for or granted; if it stopped at them, then no more was granted: if it passed them and they remained inside, then the *tract* was not limited by them, but would go beyond them. The language of the petition calls for a tract by *name*. That was one common way of making grants, i. e. of a tract by its name, and then the whole tract was carried.

Hornsby vs. U. S., 10 Wall., 232.
Higueras vs. U. S., 5 Wall., 828.
Alviso vs. U. S., 8 Id., 339.

Suppose, as we claim, there was a difference between the exterior limits of the tract called *Torreon* and the natural objects mentioned. How was it to be determined what was the extent of the grant or tract called *Torreon?* This court has answered this, in the decisions:

Graham vs. U. S., 4 Wall., 259.
U. S. vs. Pico, 5 Wall., 534
Van Reynegan vs. Bolton, 95 U. S., 33-37.

In *U. S. vs. Pico, 5 Wall., 534*, this court by Justice Field, speaking of the office of juridical possession by an *alcalde*, said:

"This proceeding involved an ascertainment and settlement of the boundaries of the land granted by the appropriate officers of the government, especially designated for that purpose and has all the force and efficacy of a *judicial determination*. It bound the former government and is equally binding on the officers of ours."

When Otero purchased this grant, he did so in view of these decisions, as being a rule of property on which he could safely make purchase.

In *Van Reynegan vs. Bolton, 95 U. S., 33*, the court

says: "Ordinarily the boundaries thus established would be accepted as conclusive by our government."

No witness has pretended to say that the tract "called *Torreon*" did not extend to the natural objects at which the *alcalde* fixed the boundaries in the juridical possession. The *alcalde* was the judge of the vicinage, necessarily acquainted with the country, the tracts of land, and the natural objects bounding them.

He went on the ground with witnesses and *determined* the "limits" as he was directed. Who can say he exceeded the "limits" of the tract of *Torreon?* This court says in the cases above cited that his acts are binding on the former governments and ours also. Can there be a doubt, in the absence of other evidence, that the *alcalde* properly described the "tract of *Torreon?*" If so, from what does it arise? The amount of land in the tract as given by the *alcalde* will not exceed 350,000 acres.

The court erred in concluding that "proper *testimonio*" to be given was something other than the "*expediente.*" The word "*testimonio*" has a technical meaning, which designates it as a document certified by a notary public, but it has an ordinary meaning which is the same as the word "*testimony*" in English and fully as broad, meaning evidence of a thing, etc. In which sense was it used? If it had been used in the technical sense it would have been by itself and not qualified, and the Governor would have said the "*testimonio*" and not the "proper *testimonio.*" Why should he have used the word "proper?" Because any evidence of title was "proper" and the word "proper" is used to show that some paper or document which could serve as evidence of title would be

given. The *expediente* was such document. In fact, under the practice of the Mexican law which was compiled from the Spanish practice, the *alcalde* generally gave the party one copy of the act of possession, and retained the other.

The court erred in the conclusion that the order of the Governor to the *alcalde* to give the possession of the land and designate the limits was an authority to designate only the limits described in the petition. The order of the Governor to the *alcalde* at the foot of the granting decree was no part of the grant that precedes it, and it is complete and the land was granted as the petitioner "asks it, according to law." The order or direction to the *alcalde* was to give the possession, designating the limits and doing what is proper, which was the order for him to find the limits or boundaries if possible of the tract "called *Torreon*," whatever they might be, and designate the limits, as the petitioner Baca had not stated the tract was limited by the natural objects he mentioned, but only that it extended to them. It will be noticed that Baca's petition for the land does not say the natural objects are the boundaries of the tract, but only that the tract extended to them. It might have extended farther, if so, the *alcalde* must show the place which it extended to, on the east. Only the limits of the tract could be designated if it differed from the natural objects mentioned; still the "limits" of the tract were to be designated by the *alcalde*. Why the necessity of having an act of juridical possession, "known only to Mexican law," if the grant was limited certainly by the natural objects mentioned? They fixed in that case the precise limits. It was because it was of a specific tract, "*Torreon*" and as to it what

were its boundaries may not have been fully known by all, so they might respect it. The specific fixing of the boundaries was for the benefit of the people. The government could ascertain for itself the boundaries of the tract whenever necessary. A construction of the grant which would render the act of possession a piece of supererogation or unnecessary will not be indulged.

There must have been an idea that possibly the "limits" of the tract were not identical with the objects named;—then the limits of the *tract* which was granted should be designated. There might have been a question as to what were the limits of the tract and thus require them to be ascertained and designated. But if there was no possibility of doubt but that the natural objects designated defined the lands of the grant, the order to the *alcalde* would not have indulged in the nonsense of designating the same objects already described in the possession and grant, but would have stopped short after directing the *alcalde* to give the possession, or at most it would have said, give the possession within the limits of the natural objects designated as boundaries. This would have been the reasonable and sensible way and probable way, if those objects were the exclusive limits of the grant.

The court erred in holding that there were not sufficient acts of possession to aid the presumption of approval by the Governor, or to invoke the presumption arising from length of time. What are the acts of possession proven?

First. The delivery of possession by the *alcalde*, a judicial officer of the vicinage, and its receipt by Baca under the grant.

Second. The sons of Baca lived at *Torreon* within the limits of the grant, attended to the father's interests; they had a *corral*, a *torreon* (with tower) and houses, and lived there with their servants. They had the flocks of their father, the grantee, Baca; they had herds of horses at Estancia, and had irrigating ditches at *Torreon* (*transcript, p. 39*) and planted small fields and gardens. Baca's servants and sons lived at *Torreon*, which was on the grant, and the witness saw four or five houses of the workmen there. They had horned cattle also at *Estancia* (*transcript, p. 40*). The place (*Estancia*) was full of horses and cattle, the overseeing was carried on for Baca; they had fifteen lots of sheep, and there must have been at least 5,000 sheep in each lot (*transcript, p. 41*). The witness, Padilla y Montoya, drove his father's animals near *Estancia* and Bernardo Chaves, the overseer, drove him off and wished to horsewhip him because his father had no right to water his stock there, it being the property of Bartolome Baca. He said the property of Bartolome Baca extended from the *Cuerro* to the *Chico* and from the *Chico* to *Pedernal*, and from the *Pedernal* to the *Cibolo* and from there to the summit of the mountains. It was notorious among the people that those were the boundaries. (*Transcript, p. 41.*) The sons of Baca, who lived at *Torreon*, said the grant was the property of their father. (*Transcript, p. 41.*) Baca had about thirty servants on the property (*p. 42, transcript*), and all the horses, cows and sheep on the property belonged to him. (*Transcript, p. 42.*) The witness, Clemente Chaves, did not know of other than Baca and his heirs being on the grant and living there, and said that the town of *Torreon* was settled by persons by the invitation and permission of Baca. (*Tran-*

script, p. 78.) The same witness also said that Baca claimed the property as his own under a grant made to him in 1819, by Melgares, Governor (*transcript, p. 79*); and that all the heirs of Baca, after his death, claimed to be the owners of the property (*transcript, p. 79*); that during the lifetime of Baca, after 1819, the property was recognized and respected by *all persons* as the property of Baca, and by the people generally, and by those living thereon and in the vicinity. (*Transcript, p. 79.*) That Baca had ranches at *Torreon* and also *Estancia* springs, on the grant, in his lifetime (*transcript, p. 79*); that the persons who lived on the grant and erected the town of *Torreon* informed him they were there by the direct consent and permission of Baca. The testimony is full of evidence of possession by Baca and by his sons, employes, laborers and with large bodies of live stock, consisting of horses, horned cattle, sheep and hogs; that Baca had several houses there, occupied by employes, and his sons had houses and resided thereon, and his children after his death; that after his death, the wife of Baca had the live stock counted and turned over to her on the property, and she placed another "boss" or overseer in charge of them and it.

It is the rule that such possession as the property is adapted to naturally is all the possession required to start the statute of limitations.

The use of the land for the purposes for which it was granted or given and the manner anticipated certainly must be held to be possession and the very possession required. Its use for other purposes might well be ground of complaint and give an opportunity to denounce the same for non-compliance with the uses and purposes for which the grant was made.

It was not required that Baca should absolutely exclude everybody from the possession of the entire tract of land, it being granted to be used for grazing. It is well known that grazing lands are more or less trespassed upon, by everyone. It is said by the court in the opinion that the Indians probably grazed their live stock on the lands. In that vicinity there were none but savage Indians and Baca kept large bodies of men on the property in order to protect his own stock from those Indians and even then he was unable to do it at all times. There can be no pretence well-founded that the Indians ever occupied any portion of the lands or grazed stock there or that there was, in fact, any settlement of civilized Indians within one hundred miles of the property.

The court in its opinion seems to have overlooked the fact that this grant was made expressly for the purpose of pasturing live stock, with simply the possibility that small parts and portions of it, limited by the scarcity of water and the necessity of its use by the stock, might be placed under cultivation. The proofs show that some small parts at or near *Torreon* were placed under cultivation by Baca; that one strip of land about 300 by 400 yards, was cultivated by him. Such a tract as that cultivated in the western country, away from plentiful running streams, is a very large amount, more than could well have been expected or anticipated. The authorities lay down the rule that the statute of limitations may be set in motion whenever the property is occupied by an adverse holder in the manner and by the means for which that property is peculiarly adapted. If property be agricultural land, then its occupation for cultivation would answer the requirement; if grazing land, in New

Mexico under the laws of Spain and Old Mexico, which laws never required fencing but rather required the herding of live stock, that possession would be sufficient; if mountainous country, adapted only to timber cutting, its occupation and use for that purpose would be such occupation as would start the statute.

It being grazing land, in the present instance, as is shown by the evidence, the occupation with live stock, grazing over it in all directions, would start the statute of limitations. The attention of the court is again called to the fact that Baca had on this ranch 75,000 head of sheep, large numbers of horses, horned cattle and a thousand hogs. The water on the property was exceedingly limited. It was necessary that the stock should graze at long distances, sometimes passing off the property to outside waters. Stock could not be maintained in such large bodies around one point or spring of water. We insist that the occupation for grazing purposes, as proven in this case, is exactly that occupation which was required and expected, and amply sufficient to start the statute of limitations.

The court has referred to the fact that the alleged will of Baca, which was admitted in evidence subject to objections, does not contain any mention of this property. It will be remembered that Baca had his sons living on this property prior to and at the time of his death. He may have, therefore, given the property to them or to his widow, who took possession after his death; but this it is impossible now to prove. The United States government has waited too long—so long that the witnesses who might have known the facts or might have known of the existence of papers,

and all old archives and records, have disappeared and passed away. The government should not hold Baca's grandchildren and great-grandchildren to as strict character of proof as they must have presented had this grant been investigated in 1851, at the time of the adoption of the California statute, while Baca's children were most of them living, and all the officials of the former govern-ernment were still in existence. Besides, the alleged will, which has been introduced, is not a proper evidence. It is only an alleged certified copy, not pretending to be certified to by anybody who had authority to certify it, not pretending to come from any proper office, nor does the paper appear to come from the hands of the person entitled to its custody. It has never been proven, no record of it is shown to have been made in any place, the original is not accounted for. And even if the copy were admissible, the mere fact that a party omits from his will the mention of a certain piece of property, is no evidence that he does not possess or claim it. If some other individual had made claim to the property, then that circumstance might assist in some way to corroborate proof that Baca did not claim the land at that time, but in this case it is of no consequence. There has never been any denouncement of the grant, and that is the only way known to law by which Baca's title could have been divested, he having had a grant made to him of the lands. Denouncement was the only remedy or procedure by which the title once bestowed could be taken away from him—unless he had abandoned the property for a long time so that a presumption might arise against him in that way. However, in this case it is shown that Baca actually claim-

ed, held and occupied the property for the purposes for which he asked it, in the manner in which he stipulated to occupy it, until the day of his death, and that his widow and children thereafter continued to occupy it for years, and their descendents and assigns down to the present time.

The court erred in holding that no grant, perfect or imperfect, was in existance at the time New Mexico was acquired by the United States, and that there is no evidence that the predecessors of grantors of petitioner had any title, perfect or imperfect, that should be confirmed. This court has frequently and without variance, except in this case held that where a grant had been made and had not been abandoned, the title was passed, although there were some condition-subsequent to be performed; that wherever a party in good faith had shown a compliance with the purposes and terms of the grant and no abandonment appeared, such facts were binding upon the former government, entitling the party to perfect his grant. This was exactly the situation in the case of *Fremont vs. U. S., 17 How. 542*: there the grant was made to Alvarado, Fremont's grantor, two years and a half before the country was occupied by the American troops. Hostilities with Indians existed at the time. It was directed that Alvarado should be placed in possession and he was required to make certain improvements within a given time. Alvarado never was placed in possession, no improvements whatever were made; in fact there never was any occupation of the grant; but this court held that two years and a half was not an unreasonable time in order to secure the delivery of juridical possession and to perform the conditions imposed, that the grant itself had given

title to Alvarado and through him to Fremont, and that title could only be divested by denouncement, which was a judicial proceeding under the Mexican and Spanish law wherein some party complained that the grantee had failed to comply with the conditions of the grant. The matter was then judicially investigated, and if found to be true, a decree was entered, declaring the grant forfeited, and giving it to the party who denounced it. Special attention is called to the Fremont case, because it decides this identical point that the grant, being imperfect, the conditions not being complied with, in any respect, and such time not having elapsed as to be construed as an abandonment of the property, Fremont's title, given by the Governor, still continued in force, and could not be taken away from him except by denouncement. In the case at bar the grant was made by the Spanish Governor in July, 1819, during the existence of the war in Mexico for her independence, when the country was very much unsettled, when officials were occupied with much more serious business, and when little attention was given to civil or private affairs. The independence of that country was achieved in less than two years from that date; a new system of government was installed, and new officers were placed in control. The old laws were practically vacated and all rights of property were guaranteed under the new system; especially was this the case under the "plan of Iguala." Had not Baca the right under the Spanish and Mexican governments to insist upon his grant being property given to him in possession? If the possession which was actually given by the *alcalde* was not a correct possession, as this court has said, on account of the al-

leged excess in the amount of lands given, did not Baca have the right to have the Governor decide whether that grant should be held by him, or disapproved and have another and more particular juridical possession given? Had he not the right also to hold the land called the "*Torreon*," or if the natural objects mentioned were the limits of that tract, had he not the right under the grant to hold to the extent of those limits. Or if that tract did not extend to those limits, had he not the right at least to hold to the extent of those natural objects, within the larger tract? The authorities are without number that he had such right. Precedent is all one way that he had.

The court's attention is called to the various authorities on this point and particularly the case of *Fremont vs. U. S., 17 How. 542*: and other cases in the same line.

The court erred in the conclusion that the burden was on the claimants to show positive approval by the Governor of the grant. How could this be done, after seventy years had passed and after fifty years had elapsed in which the United States government itself had failed to give claimants an opportunity to do so? Had the act to adjudicate these titles been passed in 1851, when the California act was passed, instead of 1887, the witnesses would then have existed by whom all such facts could have been shown; but time has eliminated them and now it does not lie with the government to say, after it has been guilty of the grossest laches in carrying out the terms of the treaty with Mexico in which all property of Mexican citizens was guaranteed, that the burden of showing a positive approval by the Governor was to be thrown on the claimants. The term "property" in the treaty com-

prehends every species of title, legal or equitable, inchoate or complete.

Bryan vs. Kennett, 113 U. S., 179.
Soulard vs. U. S., 4 Pet., 511.
Slidell vs. Grandjean, 111 U. S., 412.

Any facts from which such approval might possibly be assumed would be sufficient. The possessing of the grant document, with the indorsement upon it, that being a muniment of title which might be considered to be a "proper *testimonio*" or evidence of such title, the fact that Baca was allowed by the government itself to remain in open, continuous and notorious possession until the day of his death, in 1834, fifteen years; that fact that his ownership was recognized by everyone in the vicinity; that he and his heirs openly and notoriously claimed the property, ought all to be sufficient at this late day, to authorize the assumption that there was a government approval. It will not do to say that the government of Mexico did not recognize Baca's title. There is nothing in the papers, nothing in the evidence, nothing in the record to bear out such assertion. The bare fact that a grant was given to Nerio Montoya, not by proper authorities, certainly cannot be held to be a decision by government officials that Baca had no right to this property. On the contrary, if the grant to Nerio Montoya be inspected, it will be seen that it cannot be ascertained in any manner that it conflicts with this grant. The evidence is overpowering that the occupation of the particular locality or settlement called "*Torreon*," by Nerio Montoya and others, was at the special instance and request of Baca himself, who desired to have them there in order to assist him in protection against the

Indians. There was no prohibition in the grant against Baca's inviting other people to come on his property and live there, and aid him in protecting against Indians. On the contrary, he stipulated that he would arm people and protect the property, which the evidence shows he did do, and this is one of the ways in which he did it. When Baca invited people to come on his property, it is rather an argument that he was the owner than that he did not claim it. When they came there by his consent, who can say that their occupation was hostile? The alleged grants of *Tajique* and *Chilili* were also made by officials who had no authority to make grants. If they had no right to make grants, and were not judicial officers, acting under a proceeding of denouncement, they had no right to decide that Baca was not the owner. They had no right to take steps which would in any manner prejudice his ownership. The settlement at *Tajique* and *Chilili* having been made, it is fair to presume, as the Indians were hostile, that Baca was glad to have those settlements come there and by their presence aid him in protecting his property against the savages. It is fair to presume that he looked, was aware of their presence there and that they had no actual title or right, and therefore made no complaint. In does not appear in giving or attempting to give possession in these places—and no possession was given at Chilili whatever, that Baca was ever cited or notified to appear and show cause, in regard to these alleged possessions. An illegal title certainly cannot be invoked to defeat Baca's title which was lawful, nor can an action of a government officer who had no control over the subject matter be invoked as a recognition or direction of the government that

Baca had no rights. This would be carrying matters to an extraordinary limit. Suppose that a title was issued from the Land Office at Washington to a given piece of land, and that the Secretary of State undertook to give the same piece of land to some one else; he has no authority over it, and his action is simply a nullity. The same is true with reference to the authorities who gave these possessions on this property.

It clearly appears from the evidence of Clemente Chaves that the persons who recognized the title of Baca were everybody in the vicinity, living on or off the property, including Baca's heirs and servants, and strangers. No argument is needed to refute the contention in the opinion of the court on that subject. The Mexican government never permitted the conveyance of the property to any other parties, as the court has stated. In arriving at such a conclusion the court is in error; no legal conveyance having been made, no conveyance at all was made.

Finally we insist that if the court does not find that there was a complete and perfect grant made to the tract of land called "*Torreon*," embraced within the boundaries mentioned in Baca's petition for the grant, still the court must find that there was a grant made, which has not been completed or perfected by way of giving a correct and exact possession, but that the grant was one which was occupied, entered upon, held, claimed and used for the period of more than twenty years, and one which, if the Spanish government had continued in force in the Territory of New Mexico, Baca would have had a right to have made perfect. If he had the right to have that grant made perfect by having the proper

possession given to him for the holdings which he had, being of the exact nature, kind and character stipulated for in his petition, this court to say the least should approve the grant as an imperfect grant for the amount of eleven leagues, affirming the judgment and decision of the court below. All of which is respectfully submitted.

THOMAS B. CATRON,
Attorney for Eloisa L. Bergere.

I do hereby certify that the foregoing petition for rehearing is made in good faith and not for purposes of delay merely.

THOMAS B. CATRON.